BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

PETITION FOR WAIVER OF
THE PAGE LIMITS FOR REPLY COMMENTS

Birch Telecom, Inc., BridgeCom International, Inc., Broadview Networks, NuVox Communications, Inc., SNiP LiNK LLC, XO Communications, Inc. and Xspedius Communications, LLC (collectively, "Joint Commenters"), by their attorneys, pursuant to 47 C.F.R. §1.3, respectfully request that the Commission waive Section 1.429(g) of the its rules, which requires that replies to an opposition shall be limited to 10 double-spaced typewritten pages, as it relates to Joint Commenters' reply comments in this docket. Joint Commenters are filing their Reply to Oppositions concurrent with the instant Petition.

On June 6, 2005, the Commission received six comments (not counting Joint Commenters' own comments) on the reconsideration petitions filed in Docket 04-313. Despite the 25-page limit established in Section 1.429(f) for oppositions to petitions for reconsideration, the Commission received a total of 184 pages of oppositions, including oppositions of 48, 52 and 44 pages (excluding attachments) by BellSouth Corporation, SBC Communications, Inc., and the Verizon telephone companies, respectively. Joint Commenters were unable to respond to these

arguments within the 10-page limit ordinarily applicable to reply comments. Joint Commenters' reply exceeds the page limit by only 3 pages.

Joint Commenters submit that a waiver of the page limits will serve the public interest in this case. The issues raised in this proceeding relate to the fundamental building blocks upon which local competition is based. The issues are numerous and complex, and cannot be adequately addressed within the 10 page limit set forth in 1.429(g). The few additional pages of reply are necessary to provide the Commission with a full record upon which to render a decision in this proceeding. Moreover, no party will be overly burdened by the submission of a few additional pages in reply. Accordingly, Joint Commenters request that the Commission grant the above waiver and accept its reply comments as filed.

Respectfully submitted,

By: 

Brad E. Mutschelknaus
Steven A. Augustino
Scott A. Kassman*
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Fifth Floor
Washington, D.C. 20036
(202) 955-9600 (voice)
(202) 955-9792 (facsimile)
BMutschelknaus@KelleyDrye.com
SAugustino@KelleyDrye.com
SKassman@KelleyDrye.com

Dated: June 16, 2005

* Not admited in D.C. Practice limited to matters and proceedings before federal courts and agencies.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

REPLY TO OPPOSITIONS

Brad E. Mutschelknaus
Steven A. Augustino
Scott A. Kassman*
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
(202) 955-9600 (voice)
(202) 955-9792 (facsimile)
bmutschelknaus@kelleydrye.com
saugustino@kelleydrye.com
skassman@kelleydrye.com

Counsel to Birch Telecom, Inc., BridgeCom International, Inc., Broadview Networks, NuVox Communications, Inc., SNiP LiNK LLC, XO Communications, Inc. and Xspedius Communications LLC

Dated: June 16, 2005

TABLE OF CONTENTS

Page

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

REPLY TO OPPOSITIONS

Birch Telecom, Inc., BridgeCom International, Inc., Broadview Networks, NuVox Communications, Inc., SNiP LiNK LLC, XO Communications, Inc. and Xspedius Communications, LLC (collectively, "Joint Commenters"), by their attorneys, pursuant to 47 C.F.R. §1.429(g), respectfully reply to the Oppositions filed by BellSouth Corporation ("BellSouth"), Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom ("Iowa Telecom"), SBC Communications, Inc. ("SBC"), Qwest Communications International, Inc. ("Qwest"), and the Verizon telephone companies ("Verizon") (collectively, "ILECs") on June 6, 2005 in the above-captioned proceedings. In support of the instant Reply, Joint Commenters show as follows:

DISCUSSION

I. THE COMMISSION MUST REVISE ITS IMPAIRMENT ANALYSES TO REFLECT CHANGES, WHETHER THEY INDICATE IMPAIRMENT OR NON-IMPAIRMENT

In its *Order on Remand* ("*TRRO*"),[1] the Commision concluded that "once a wire center is determined to be a Tier 1 wire center, that wire center is not subject to later reclassification as a Tier 2 or Tier 3 wire center."[2] The FCC also found that fiber-based collocator counts should not include collocation by affiliates of the ILEC, and that collocations maintained by two or more affiliates should be counted as one collocator.[3] At the time the Commission made these rulings, the possibility that the largest ILECs would acquire the two largest facilities-based CLECs was not contemplated.

In their Petition for Reconsideration, Joint Commenters argued *inter alia* that requesting carriers will be materially, adversely impacted if the Commission permits Verizon and SBC to count the fiber-based collocations of MCI's and AT&T's local exchange affiliates and then "freeze" such counts before it completes its acquisitions of the carriers.[4] Joint Commenters also argued that this "one-way ratcheting rule" flatly contradicts the impairment analysis required by Section 251(d)(2) of the Act.[5]

---

1 *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order on Remand, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Feb. 4, 2005) ("*Triennial Review Remand Order*") ("*TRRO*").

2 47 C.F.R. § 51.319(e)(3)(i). Likewise, the Commission found that "once a wire center is determined to be a Tier 2 wire center, that wire center is not subject to later reclassification as a Tier 3 wire center." 47 C.F.R. § 51.319(e)(3)(ii).

3 47 C.F.R. § 51.5 (definition of fiber-based collocator).

4 In *the* Matter *of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange* Carriers, WC Docket No. 04-313, CC Docket No. 01-338, Petition for Reconsideration of Birch Telecom, Inc., BridgeCom International, Inc., Broadview Networks, Eschelon Telecom, Inc., NuVox Communications, Inc., SNiP LiNK LLC, XO Communications, Inc. and Xspedius Communications, LLC, filed March 28, 2005 (filed March 28, 2005) ("Joint Commenters' Reconsideration Petition") at 24-25.

5 *Id.* at 25.

In their Oppositions, the four Bell Operating Companies ("BOCs") responded with nearly identical arguments against revisiting the wire center classifications, claiming *inter alia* that a decline in the number of business lines or fiber-based collocators is the likely result of competition, particularly intermodal competition, and that such declines do not alter the fact that competitive deployment is possible.[6] Moreover, the BOCs maintain that the proposed mergers have nothing to do with the Commission's non-impairment thresholds, and that any potential impact of the mergers should be addressed in the merger proceedings rather than in the instant dockets.[7]

The BOCs' arguments are speculative at best and, at worst, deny requesting carriers access to essential facilities where deployment is not economic. While the BOCs contend that a decline in the number of business lines or fiber-based collocators signifies competition, the Commission's analysis points in the opposite direction. The Commission found that requesting carriers are impaired in the provision of telecommunications services if competitive conditions are below the threshholds set in the TRRO. If the conditions fall below those threshholds, regardless of what conditions may have looked like in the past, the FCC's impairment finding is the only lawful conclusion. The BOCs' speculation as to why the conditions may not be met is both unsupported and irrelevant. It is just as likely that a future failure to meet the conditions is due to the market failure of requesting carriers or a change in the strategic direction of a competitive carrier. AT&T, one of the parties to the mergers at issue

---

6 *See,* In *the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313, CC Docket No. 01-338, Consolidated Response of BellSouth Corporation to Petitions for Reconsideration and Clarification, filed June 6, 2005 ("BellSouth Opposition") at 15-16; Response of Verizon to Petitions for Reconsideration, filed June 6, 2005 ("Verizon Opposition") at 38-40; Response of SBC Communications Inc. to Petitions for Clarification and/or Reconsideration filed June 6, 2005 ("SBC Opposition"), at 25-26; Opposition of Qwest Communications International Inc., filed June 6, 2005 ("Qwest Opposition') at 10.

7 *Id.*

here, made such a strategic change when it announced its withdrawal from the mass market late last year. Indeed, the Commission's decision on this very issue may well hasten such events, as failing to account for the mergers of SBC and AT&T on the one hand, and Verizon and MCI on the other, will have a material, adverse effect upon requesting carriers' ability to obtain access to UNEs and could then drive such competitors from the market. In cases such as this, previous competitive deployment is not evidence of non-impairment by reasonably efficient competitors; to the contrary, the failure is more appropriately seen as evidence of impairment, because the deployment while made was not economic.

More importantly, these mergers will change the competitive landscape that the Commission assumes by use of the fiber-based collocator proxy. In the *TRRO*, the Commission adopted a test "designed to capture both actual and potential competition, based on indicia of significant revenue opportunities at wire centers."[8] It "determined that the best and most readily administered indicator of the potential for competive deployment is the presence of fiber-based collocators in a wire center."[9] Further, the Commission explained that "fiber-based collocation [i]s a key factor in determining where competing carriers already have deployed fiber transport facilities because a sufficient degree of such collocation indicates the duplicability of these network elements and, thus, a lack of impairment."[10]

Contrary to the BOCs' contentions, the fiber band collocator criterion never was intended solely as a prediction of possible competition. Its purpose is to identify actual competitive deployment, with such actual deployment being used as a predictor of future deployment only where multiple competitors **already** are operational. In fact, the Commission

---

8 TRRO at ¶88.

9 *Id.* at ¶93.

10 *Id.* at ¶96.

insisted upon the presence of four (or in some cases three) actual fiber-based collocators primarily because deployment by AT&T and MCI would **not** reflect upon whether other CLECs are imparied on the same routes. It is plain fact that CLECs cannot replicate the networks of AT&T and MCI. AT&T, in particular, has spent decades and billions of dollars to create a competitive local presence. AT&T, as well as MCI, were also at a distinct competitive advantage in attracting customers, especially vis a vis other CLECs, given their extensive relations with customers and vendors. By contrast, CLECs operating in today's telecommunications environment do not have the same access to capital, the necessary time to build-out their networks and acquire customers, or even the same ability to leverage existing relationships as AT&T or MCI had. Therefore, simply because AT&T and MCI may have deployed facilities it does not follow that it is economic for other CLECs to do so.[11] Second, once the mergers are consumated, the legacy AT&T and MCI facilities may be withdrawn from the market entirely, and even if they are not withdrawn, they will be controlled by ILECs rather than by a non-ILEC source. Either way, these facilities will cease to be competitive facilities, and they will cease to reflect the availability of alternatives to future requesting carriers.[12]

Accordingly, the Commission must address the acquisitions of AT&T and MCI in the instant dockets by excluding AT&T and MCI facilities from its analysis and instead counting those carriers as affiliates of the respective ILECs.

---

11 *See, e.g.,* Ex *Parte* Letter of Edward C. Yorkgitis, Kelley Drye & Warren LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 05-65/05-75 (June 6, 2005) at 7-9 (CLECs cannot replicate the AT&T and MCI networks); *see also, e.g., Ex Parte* Letter of Theresa D. Baer, Latham & Watkins LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket Nos. 05-65/05-75 (June 2, 2005) at 10 (citing limited alternatives to AT&T's and MCI's networks and unlikely entry/expansion by CLECs).

12 Moreover, as Joint Commenters showed in their Petition for Reconsideration, the fiber-based collocator test cannot be applied as the exclusive basis for finding non-impairment. The Commission must consider fiber-based collocators in conjunction with the size of the wire center before it can make any determination of impairment or non-impairment.

II. THE COMMISSION SHOULD ELIMINATE THE CAP ON DS1 DEDICATED TRANSPORT

As advocated in Joint Commenters' Reconsideration Petition, the Commission should eliminate the DS1 transport cap because, among other things, it undermines the use of EELs.[13] In their Oppositions, the ILECs attack Joint Commenters' request to eliminate the DS1 transport cap, maintaining that Joint Commenters' arguments are premised upon a desire to avoid multiplexing traffic.[14] The ILECs attack is incorrect. What the ILECs fail to understand is that CLECs use DS1 transport differently from the way CLECs use DS3 transport. CLECs most often use DS1 transport circuits when they are dedicated to a single customer. They are not multiplexed, and do not aggregate traffic among multiple users. DS3 transport, on the other hand, is used less frequently and is typically used to aggregate traffic from multiple customers, and may carry different types of services at the DS1 level (e.g., voice, data, private lines, etc.). Futher, DS3 transport is used by carriers that are collocated at both wire centers on the routes, whereas DS1 transport frequently is used as part of a DS1/DS1 EEL. If a carrier were to substitute a DS3 for multiple DS1 transport links, it would be required to install multiplexing equipment at both ends of the route or purchase multiplexing from the ILEC or another source. In addition, it likely would need to collocate at both ends of the route, an expensive and time consuming endeavor. Thus, it does not necessarily follow that it will be more efficient for a CLEC to substitute a DS3 for multiple DS1s simply because the carrier exceeds a specified number of DS1 circuits.

---

13 Joint Commenters' Reconsideration Petition at 5.

14 BellSouth Opposition at 18-19; Verizon Opposition at 21-22; SBC Opposition at 11-13; Qwest Opposition at 2-3.

Furthermore, as Joint Commenters argued in their Reconsideration Petition, the DS1 transport cap would render the DS1 loop cap superfluous and undermine the use of EELs.[15] If a requesting carrier were limited to 10 DS1 transport circuits per route, then it would be unable to provision more than 10 DS1/DS1 EELs to customers served by any given wire center. This in effect would limit the requesting carrier to 10 DS1 loops in the entire wire center, rather than 10 loops per customer location. In response to Joint Commenters' claims that the transport cap would undermine the use of EELs, BellSouth states that Joint Commenters "ignore[] that the Commission's impairment standard requires consideration of a 'reasonably efficient competitor' and not a carrier's 'particular business strategy,' such as a CLEC electing to use EELs."[16] BellSouth's claim is absurd.

First, despite BellSouth's back-handed put-down, EELs are used by "reasonably efficient competitors." In fact, the Commission has repeatedly found that EELs are ***efficient network arrangements*** which extend the reach of requesting carriers' networks, save collocation space and reduce collocation costs, thereby allowing carriers to serve customers they otherwise may be unable to serve.[17] Furthermore, BellSouth misunderstands the "reasonably efficient competitor" standard. Neither the Act nor the Commission's orders limit CLECs to any particular business strategy. Instead, the Commission has repeatedly emphasized that the Act permits all available business strategies.[18] The fact that some CLECs may deploy business strategies that do not rely upon EELs does not undermine the legitimacy of an EEL strategy.

---

15 Joint Commenters' Reconsideration Petition at 6.

16 BellSouth Opposition at 21.

17 *TRO* at ¶576.

18 TRRO at ¶25.

Neither BellSouth nor a competitor should not be able to dictate the business strategies used by the requesting carrier.

III. THE COMMISSION SHOULD ELIMINATE THE EEL ELIGIBILITY CRITERIA

In the *TRRO*, the Commission for the first time adopted a direct prohibition on the use of UNEs for the exclusive provision of long distance services.[19] Joint Commenters in their Petition for Reconsideration argued that this new rule, Rule 51.309(b), eliminates the need for an EEL eligibility standard and that the Commission therefore should eliminate the EEL eligibility criteria. The BOCs oppose elimination of the eligibility criteria, maintaining that the criteria serve as a test to determine whether carriers are following Rule 51.309(b).[20]

The BOCs' arguments are simply without merit. The BOCs do not claim that the EEL criteria are essential to the finding of impairment. They also do not point to any instances where the EEL criteria are needed to prohibit uses that would not otherwise be prohibited by Rule 51.309(b). Instead, the BOCs justify the EEL criteria **solely** as an enforcement mechanism. Yet their vague cries of possible "gaming" are starkly reminiscent of the boy who cried "wolf." We keep hearing that "gaming" is possible, but the BOCs do not explain why Rule 51.309(b) is insufficient. The Commission is able to police Rule 51.309(b) using all of the investigative and enforcement powers available to it under the Communications Act. Indeed, the Commission has a significant number of rules in Part 51 and elsewhere, for which these powers provide more than adequate enforcement capabilities. Further, the BOCs themselves are capable of bringing any violations to the Commission's attention through Section 208 complaints or by some other enforcement vehicle.

---

19 *Id.* at ¶36.

20 SBC Opposition at 14-15; Qwest Opposition at 4-5; Verizon Opposition at 41; BellSouth Opposition at 24-25.

Nor have the BOCs shown a single example of "gaming." To the contrary, BellSouth comments illustrate quite dramatically the overly restrictive effect of the EEL criteria. BellSouth has harassed NuVox for more than three years seeking to audit NuVox's compliance with the prophylactic EEL criteria. BellSouth pursues these audits without any demonstration of cause or "concern." To date, none of the various complaint cases filed by BellSouth against NuVox have shown that NuVox is using EELs for exclusively long distance service, or even that NuVox is not providing a significant amount of local service. Instead, BellSouth's campaign of scorched-earth litigation is aimed at nothing more than diverting NuVox's internal and external resources in an endless dispute over whether NuVox's conversion certifications were valid. As the attached Reply Declaration further details, BellSouth has relied upon false information, has consistently misrepresented both the facts and the law, and in some cases it has completely fabricated tales, all in an effort to paint NuVox as the "poster child" for EELs non-compliance.[21] NuVox categorically denies that it has failed to comply with the Commission's orders or its interconnection agreement, and has submitted management attestations to that effect to an EELs auditor engaged by BellSouth.

Straying far from the rules' original intent to provide clarification to CLECs, BellSouth has used the EEL eligibility critera as a "sword" to harass its competitors which rely on EELs to deliver local exchange services. The Commission must take the sword from the ILECs' hands by eliminating the EEL eligibility criteria.

---

21 *See,* Reply Declaration of Riley E. Murphy, attached hereto.

IV. THE IOWA TELECOM AND VERIZON PROPOSALS WOULD FURTHER WEAKEN THE COMMISSION'S DEDICATED TRANSPORT IMPAIRMENT TEST

The Commission's transport impairment tests suffer from a series of fundamental flaws that substantially overstate the number of routes for which carriers do not face impairment.[22] Iowa Telecom in its Reconsideration Petition proposes that the Commission add a third disjunctive factor to assess non-impairment: the presence of at least four (in the case of Tier 1 wire centers) or three (in the case of Tier 2 wire centers) competitive dedicated interoffice transport providers each with a POP are present anywhere in the ILEC's wire center area. As Joint Commenters noted in their Opposition to Iowa Telecom's Reconsideration Petition, Iowa Telecom's proposal would only further weaken the Commission's test by creating additional false findings of impairment. Essentially, what Iowa Telecom asks the Commission to do is to reconsider BellSouth's and Verizon's single end-point proposals -- proposals that the Commission has already rejected for their "false sense of competitiveness."[23] Because Iowa Telecom's Petition does not present any new facts but rather is simply a re-tread of Verizon's and BellSouth's single end-point proposals, it does not meet the Commission's standard for reconsideration.[24] On this basis alone the Commission must reject Iowa Telecom's Petition.

Verizon's Opposition lends support to Iowa Telecom's proposal and goes even further down the wrong road by suggesting that the Commission infer that a competitive

---

22 *See,* Joint Commenters' Reconsideration Petition at 17-21.

23 TRRO at ¶ 84.

24 *See* 47 C.F.R. 1.429(b). *See also, e.g., Licenses of 21st Century Telesis Joint Venture and 21st Century Bidding Corporation For Facilities in the Broadband Personal Communications Services Petition for Reconsideration*, 16 FCC Rcd 17257 at ¶26 ("21st Century has not presented any new facts that warrant reconsidering the Commission's prior decision"); *Federal-State Joint Board on Universal Service Petition for Reconsideration Filed By USTA*, 16 FCC Rcd 19789 at ¶5 ("We deny the request of USTA to reconsider portions of the Contribution Interval Order. We find that USTA has raised no new issues or facts to persuade us to reconsider the decisions made in the Contribution Interval Order").

transport provider's POP exists whenever a competitor has deployed its own fiber network in a wire center where it has no collocation.[25] As Joint Commenters noted in their Opposition, transport must connect two wire centers in order to be a UNE.[26] This is appropriate, for transport is used most often by requesting carriers purchasing unbundled loops that terminate in a wire center, and a requesting carrier must be able to access the transport at the wire center in order to connect it to unbundled loops that it obtains in that wire center. Verizon's proposal would facilitate additional non-impairment findings in cases where a competitive transport provider's POP may be many miles outside of the ILECs' serving wire center area. Verizon's proposal is inconsistent with the Commission's definition of transport and the requirement that non-impairment be assessed on a route-specific basis. Its proposal would only further impede requesting carriers' ability to connect their loop facilities to their transport facilities and cause competitive carriers to incur additional transport costs. Moreover, Verizon's proposal to require requesting carriers to provide detail where they have deployed fiber networks in wire centers where they have not collocated is not only burdensome, but such data is confidential and proprietary. In light of the foregoing, the Iowa Telecom and Verizon proposals must be rejected.

V. THE COMMISSION MUST CLARIFY THAT REQUESTING CARRIERS ARE ENTITLED TO THE TRANSITION RATE UNTIL MARCH 11, 2006

Verizon contends in its Opposition that "CLECs have an obligation to submit the orders necessary to transition their embedded base sufficiently in advance of the March 11, 2006 deadline so that orders may be processed and completed by that date."[27] Contrary to Verizon's assertions, CLECs may submit their conversion orders at any time prior to March 11, 2006 and thus obtain transitional pricing for the entire one-year transition period. As the Commission

---

25 Verizon Opposition at 24-25.

26 *TRO* at ¶365.

27 Verizon Opposition at 17-18.

stated in the *TRRO*, "[w]e require competitive LECs to submit the necessary orders to convert their mass market customers to an alternative service arrangement within twelve months of the effective date of this Order."[28] The CLEC's obligation is to "submit the necessary orders" within the time period. It cannot control whether the ILEC fulfills those orders promptly, or even at all. ILECs may encounter delays for any number of reasons, most of which have nothing to do with the CLEC's actions. In this case the possibility of ILEC delay is particularly acute, because many CLECs will be submitting orders in a very short timeframe, occasioned by the LECs' withdrawal of DS1 and DS3 UNEs in many locations. If the ILEC is unwilling or unable to complete these orders, the consequences of that should fall on the ILEC, not the CLEC who submitted the orders.

Further, the Commission held that "***[a]t the end of the twelve-month period***, requesting carriers must transition all of their affected high-capacity loops to alternative facilities or arrangements."[29] The Commission also made similar pronouncements for DS1 and DS1 dedicated transport[30] and mass market switching.[31] Based on the foregoing language, Joint Commenters submit that they are entitled to transitional pricing for all affected UNEs until March 11, 2006 and ask the Commission to clarify this matter in order to ensure a seamless transition to alternative arrangements.

---

28 TRRO at ¶227.

29 *Id.* at ¶196 (emphasis added).

30 *Id.* at ¶143.

31 *Id.* at ¶227.

CONCLUSION

In light of the foregoing, Joint Commenters request that the Commission reconsider those aspects of the *TRRO* provided for in their Petition for Reconsideration.

Respectfully submitted,

By: _____

Brad E. Mutschelknaus
Steven A. Augustino
Scott A. Kassman*
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
(202) 955-9600 (voice)
(202) 955-9792 (facsimile)
bmutschelknaus@kelleydrye.com
saugustino@kelleydrye.com
skassman@kelleydrye.com

Dated: June 16, 2005

* Not admited in D.C. Practice limited to matters and proceedings before federal courts and agencies.

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

REPLY DECLARATION RILEY M. MURPHY
ON BEHALF OF NUVOX COMMUNICATIONS, INC.

I, Riley M. Murphy, being of legal age and duly sworn, do hereby depose and state:

1. I am over the age of 18 and am under no disability which would render me incompetent to make this declaration. I have personal knowledge of all the statements made in this declaration, and they are true and correct.

2. My business address is 2 North Main Street, Greenville, South Carolina. I currently serve as Executive Vice President, General Counsel and Secretary of NuVox, Inc. and its operating subsidiaries including NuVox Communications, Inc. ("NuVox"), since the merger on May 21, 2004 between an acquisition subsidiary of NuVox, Inc. and NewSouth Holdings, Inc. where I had served in the same capacity since January 2004. In this position, one of my responsibilities is to oversee legal and regulatory issues related to or arising from NuVox's purchase of interconnection, network elements, collocation, and other services from BellSouth Telecommunications, Inc. ("BellSouth"). I am familiar with the interconnection agreements between NuVox and BellSouth, including the interconnection agreement ("Agreement") that underlies the regional EEL audit dispute between NuVox and BellSouth. In 2000, at the time the Agreement was executed, I served as the Senior Vice President, General Counsel and Secretary for TriVergent Communications, until its merger with an acquisition subsidiary of Gabriel Communications, Inc, which later changed its name to

NuVox, Inc. In that capacity, I oversaw the negotiation of the Agreement, and I executed the Agreement on behalf of NuVox (then TriVergent).

3. I am familiar with the negotiations of the regional nine-state interconnection Agreement that is at issue in this case. In preparing this declaration, I have reviewed the affidavits of Hamilton E. Russell regarding the negotiation of the Agreement. Mr. Russell, through June 6, 2005, served as Vice President of Legal and Regulatory Affairs for NuVox. I also have discussed the negotiation of the Agreement with Mr. Russell who negotiated the Agreement.

4. NuVox is a competitive local exchange carrier ("CLEC") that provides telecommunications services in sixteen states throughout the Midwest and Southeast United States, including BellSouth's nine-state region.

5. The purpose of my Reply Declaration is to respond to the allegations made by Mr. Jerry Hendrix in his Reply Declaration filed by BellSouth in its Consolidated Response to Petitions for Reconsideration and Clarification filed on June 6, 2005, in this proceeding. Mr. Hendrix's declaration contains numerous erroneous statements concerning the regional EELs audit dispute between NuVox and BellSouth.

6. My Reply Declaration also responds to several erroneous statements made by BellSouth in the body of its Consolidated Response.

7. Contrary to Mr. Hendrix's statements, NuVox has challenged BellSouth's audit requests because BellSouth has sought to conduct audits that are beyond the scope of the audits it is entitled to conduct under the parties' Agreement, which incorporates certain audit related requirements from the Federal Communications Commission's ("FCC") June 2, 2000, *Supplemental Order Clarification* released in CC Docket No. 96-98.

8. The parties entered into and signed a single interconnection agreement that governs their relationship throughout each of the nine states in BellSouth's region. The parties filed copies of the interconnection agreement with the applicable state commission. Although there is technically a different interconnection agreement in each state approved by each state commission, the provisions in each agreement relevant to this dispute are identical and their meaning does not vary from state to state.

9. The parties voluntarily negotiated the terms and conditions of the Agreement pursuant to sections 251 and 252 of the Communications Act of 1934, as amended (the "Act"). The parties did not arbitrate any of the provisions before any state public service commission.

10. The parties were fully aware of and considered the *Supplemental Order Clarification* when they negotiated the Agreement.

11. BellSouth's right to audit NuVox's converted EEL circuits is not unlimited (as it has claimed in various fora) and it is not based solely on section 10.5.4 of Attachment 2 to the Agreement. Section 10.5.4 of the Agreement does not operate independently from or "notwithstanding" the General Terms and Conditions. Instead, BellSouth's limited right to audit NuVox's converted EEL circuits is governed by that section as well as more generally applicable sections of the Agreement, including sections 23 and 35.1 of the Agreement's General Terms and Conditions.

12. In the overarching General Terms and Conditions of the Agreement, NuVox and BellSouth agreed that the Agreement would be governed by the laws of BellSouth's home state – the state of Georgia. Section 23 of the General Terms and Conditions of the Agreement specifies that the "Agreement shall be governed by, and construed and enforced in accordance with, the laws of the state of Georgia."

13. Georgia law holds that law existing at the time of contracting becomes part of the contract, as though expressly set forth therein and unless expressly exempted or displaced. Under Georgia law, no implication to the contrary is permissible.

14. Contrary to Georgia law, BellSouth insists that, by implication, all law that is not expressly replicated or referenced in the agreement is excluded. State commissions in Georgia, North Carolina and Kentucky have all in one form or another rejected BellSouth's novel and unfounded restatement of Georgia law.

15. NuVox and BellSouth also negotiated an "applicable law" provision, which, consistent with their choice of Georgia law, reflects NuVox and BellSouth's agreement to comply with all applicable law in effect at the time of contracting (subsequent changes in law may be included via change in law amendments). All applicable law is incorporated into the Agreement unless specifically excluded or displaced. Section 35.1 of the General Terms and Conditions states:

> Each Party shall comply at its own expense with all applicable federal, state, and local statutes, laws, rules, regulations, codes, effective orders, decisions, injunctions, judgments, awards and decrees that relate to its obligations under this Agreement. Nothing in this Agreement shall be construed as requiring or permitting either Party to contravene any mandatory requirement of Applicable Law, and nothing herein shall be deemed to prevent either Party from recovering its cost or otherwise billing the other Party for compliance with the Order to the extent required or permitted by the term of such Order.

Agreement, General Terms and Conditions, § 35.1.

16. As a result of the absence of an express negotiated exemption from or displacement of the *Supplemental Order Clarification's* concern and independent auditor requirements or express language that conflicts with those requirements in section 10.5.4 of Attachment 2, the concern and independent auditor requirements of the *Supplemental Order Clarification* are incorporated into the Agreement by operation of section 23 of the General Terms and Conditions (and such incorporation

is reinforced by operation of section 35.1 of the General Terms and Conditions) and must be satisfied prior to BellSouth's commencement of any audit.

17. As NuVox's witness in the Georgia PSC's EEL audit case explained through sworn testimony, since Georgia law was chosen by NuVox and BellSouth as governing law, and in light the applicable law provision, there was no need fro the parties to repeat the concern and independent auditor requirements of the *Supplemental Order Clarification* in section 10.5.4 of Attachment 2. NuVox's witness in that case was Mr. Russell. Mr. Russell was NuVox's primary in-house negotiator of the Agreement. Mr. Russell was personally involved in negotiating section 10.5.4 of Attachment 2 to the parties' Agreement, as well as sections 23 and 35.1 of the Agreement.

18. In Georgia, BellSouth elected not to sponsor a witness with knowledge of the contract negotiations. Mr. Hendrix did not negotiate the relevant provisions of the contract for BellSouth.

19. Mr. Russell's sworn testimony from the Georgia case also demonstrates that NuVox and BellSouth specifically agreed not to exclude or displace the concern requirement of the *Supplemental Order Clarification* from the Agreement. BellSouth initially proposed language for section 10.5.4 that would have allowed BellSouth to conduct audits at its "sole discretion." Mr. Russell testified under oath that he recalled that NuVox and BellSouth discussed and agreed that the proposed language was inconsistent with the audit prerequisites set forth in the *Supplemental Order Clarification*, including the concern requirement set forth in footnote 86 of that order. Accordingly, NuVox and BellSouth agreed to strike BellSouth's proposed language that would have allowed BellSouth to conduct audits at its "sole discretion."

20. BellSouth's own actions indicate that it believes that the *Supplemental Order Clarification's* concern and independent auditor requirements are incorporated into the Agreement.

By letter dated March 15, 2002, BellSouth notified NuVox of its intent to conduct audits of all of NuVox's converted EELs in each state pursuant to the *Supplemental Order Clarification*. Notably, BellSouth's March 15, 2002 notice says "per the Supplemental Order" or something akin thereto multiple times. In his sworn affidavit, Mr. Hendrix neglects to disclose his reliance on that order (rather than the Agreement) in his March 15, 2002 letter. Mr. Hendrix and his company now maintain that the *Supplemental Order Clarification* does not apply – at least with respect to the concern and independent auditor requirements contained therein.

21. BellSouth also submitted that March 15, 2002 letter to the FCC, in accordance with the requirement in the *Supplemental Order Clarification* that the ILECs notify the FCC prior to conducting an audit. That particular requirement, however, is not expressly memorialized in the Agreement, but is incorporated into the Agreement by operation of Georgia law.

22. After receipt of the March 15, 2002 notice, NuVox requested that BellSouth provide it with information regarding the requisite concern(s) it had to trigger the audit and to identify the particular EELs and certifications to which the concern(s) was relevant. BellSouth, and Mr. Hendrix personally, acknowledged the obligation to meet the concern requirement prior to auditing, but has since reversed position. NuVox also raised numerous other issues regarding BellSouth's request. To this end, NuVox and BellSouth conducted several phone calls and exchanged extensive correspondence. NuVox and BellSouth were unable to resolve many of these issues.

23. In a letter dated April 1, 2002, BellSouth offered the following allegations of concern in support of its multi-state audit request: (1) BellSouth's records show a high percentage of intrastate access traffic in Tennessee and Florida, and (2) NuVox claimed a significant change in certain percent interstate jurisdictional factors. The information that BellSouth provided in its letter dated April 1, 2002, to my knowledge is false and does not appear to be related in any way to the

converted EEL circuits for which NuVox has certified that it was the exclusive provider of local exchange services at the time of the conversion request. Moreover, NuVox and BellSouth have agreed that the percentage of local traffic factors for those states is and has been in the mid-ninety percent range. BellSouth has refused informal and formal requests to provide documentation to support its accusations.

24. As Mr. Hendrix indicates in his declaration, BellSouth filed a complaint against NuVox at the Georgia PSC seeking to enforce what it claims to be an unlimited right to conduct EEL audits. What Mr. Hendrix fails to disclose in his declaration is that the Georgia PSC, after a full evidentiary hearing, several administrative law judge and staff recommendations, entered an order on June 30, 2004 vindicating NuVox's position. The Georgia PSC, applying Georgia law, found that the concern and independent auditor requirements were indeed incorporated into the Agreement. The Georgia PSC found that BellSouth had demonstrated a concern with respect to only 44 circuits. Notably, BellSouth did not demonstrate a concern with respect to any circuits until days before the Georgia PSC voted on the matter. For about two years, BellSouth had failed to meet the concern requirement in any respect.

25. The Georgia PSC also effectively barred BellSouth from using as an independent auditor a group of consultants known as American Consultants Alliance. The Georgia PSC concluded that NuVox had raised serious concerns with respect to that entity's qualifications as an independent auditor.

26. On August 24, 2004, the Georgia PSC issued an order denying BellSouth requests for reconsideration on the scope of the audit ordered and as to who shall pay for the audit (pursuant to the Agreement, the Audit will be conducted at BellSouth's "sole expense"). The Georgia PSC also clarified that its order did not speak to whether BellSouth could use customer proprietary

network information ("CPNI") in the course of the audit under section 222(d)(2) of the Act, and cautioned BellSouth that if it were to disclose CPNI to the auditor, it would be doing so at its own risk.

27. BellSouth appealed the Georgia PSC's orders in both federal and state court on or about September 24, 2004. The state appeal has been stayed and the federal appeal remains pending.

28. BellSouth selected KPMG to perform as an independent auditor in compliance with AICPA standards an audit of NuVox's certification of the 44 circuits. The audit commenced in November 2004. NuVox personnel met with KPMG personnel numerous times and provided in a timely manner records and information relevant to the conversion certifications for the 44 circuits.

29. In March 2005, KPMG provided NuVox with several versions of a preliminary audit report. KPMG requested that NuVox review its preliminary audit report and advise KPMG of any inaccuracies, errors, and issues related to information relevant to the audit. KPMG also requested that NuVox engage in this verification process as a step toward providing a management attestation. KPMG advised that it would work cooperatively with NuVox to correct discrepancies between the preliminary report and NuVox's verified findings and to finalize a management attestation. KPMG provided templates for the management attestation.

30. NuVox proceeded with its review and verification immediately. This review revealed that one version of KPMG's preliminary report contained a hidden column indicating that KPMG had in its possession and considered records it received from BellSouth. It is unknown why KPMG had these records, how KPMG came into possession of these records, or how consideration of BellSouth's records factored into KPMG's analysis and findings.

31. On April 27, 2005, NuVox requested clarifications from KPMG regarding its management attestation template. KPMG did not respond.

32. During the audit, KPMG breached a Nondisclosure Agreement ("NDA") it had entered into with NuVox by disclosing protected information to BellSouth. KPMG has had untold number of conversations with BellSouth about the audit and improperly released the preliminary, unverified audit results and other information to BellSouth. The extent and content of these conversations are to some extent unknown.

33. NuVox sued KPMG for breach of the NDA and related claims in South Carolina state court on May 5, 2005. KPMG petitioned to have the dispute moved to arbitration and NuVox and KPMG were able to agree to terms providing that the matter would be addressed through arbitration. BellSouth moved to intervene in the court case and its motion was denied.

34. In a May 27, 2005 letter to Mr. Hendrix, KPMG expressly stated that its "examination was incomplete and therefore has not produced any findings or conclusions that may be relied upon in any way by any party, including NuVox or BellSouth." KPMG also indicated that it was suspending work on the audit as its independence under AICPA standards had been compromised and that it would not continue its work until the independence issue was resolved.

35. Despite KPMG's admonition that its preliminary report was incomplete and should not be relied on by BellSouth, in his affidavit –and in similar affidavits filed in pending complaint cases before multiple state commissions, Mr. Hendrix relies on KPMG's flawed and unreliable preliminary report in an attempt to justify and further BellSouth's predatory EEL audit litigation strategy. Mr. Hendrix's reliance on information that KPMG itself states should not be relied upon is improper.

36. Mr. Hendrix's characterization of what KPMG told BellSouth also is unbelievable. Despite KPMG's May 27, 2005 letter, in his June 3, 3005 declaration, Mr. Hendrix still seeks to rely on "high-level" results that KPMG previously provided to BellSouth (in breach of the NDA). Mr. Hendrix then discusses (erroneous) circuit specific findings that are neither "high-level" nor reliable. Mr. Hendrix then makes assertions regarding NuVox's record keeping practices and "control" structure that are utterly unfounded.

37. Unhappy with the pace at which NuVox was proceeding with its verification, BellSouth filed a motion to compel with the Georgia PSC on April 6, 2005. In the motion, BellSouth requested that the Georgia PSC order NuVox to issue the management assertion. Among other things, BellSouth's motion mischaracterized the nature of the task NuVox was asked to conduct. BellSouth's motion also contained inflammatory, baseless and erroneous accusations about NuVox's conduct. BellSouth had no knowledge of what NuVox actually was doing with respect to the verification and management attestation, yet suggested to the Georgia PSC that it did.

38. In response to BellSouth's motion and NuVox's own filings, the Georgia PSC sought to establish deadlines for the completion of the verification and management attestation. NuVox consented to these deadlines and they were memorialized in the Georgia PSC's May 4, 2005 order.

39. On May 11, 2005, in compliance with the deadlines agreed to and established by the Georgia PSC, NuVox filed with the Georgia PSC and sent to KPMG a management attestation that that contained management assertions that did not require verification of KPMG's preliminary report.

40. In compliance with the deadlines agreed to and established by the Georgia PSC, NuVox filed with the Georgia PSC and sent to KPMG a management attestation including assertions based on NuVox's verification of KPMG's preliminary report on June 3, 2005.

41. NuVox's verification revealed that the methodology used by KPMG to arrive at the conclusions in its preliminary report were substantially flawed. NuVox's verification revealed no material noncompliance in this set of 44 "high risk" EEL circuits (*i.e.,* those circuits for which the Georgia PSC concluded that BellSouth had established a concern) and an extraordinarily high level of certification accuracy. Although no audit of NuVox's control process was ordered by the Georgia PSC or provided for in the Agreement, NuVox's review also indicates that an adequate and effective control process was I place.

42. Mr. Hendrix's inflammatory comments regarding the EEL audit dispute between NuVox and BellSouth in Kentucky require additional response. In response to a BellSouth complaint similar to the one it filed in Georgia, the Kentucky PSC issued an order allowing BellSouth to audit 15 converted circuits for which it found BellSouth to have had a concern. The Kentucky PSC also found that BellSouth had hired an independent auditor and that NuVox could only contest the independence of an auditor in a proceeding in which BellSouth would seek damages as a result of an audit. Like the Georgia PSC's decision, the Kentucky PSC vindicated NuVox's position regarding the incorporation of the concern and independent auditor requirements into the Agreement.

43. NuVox, however, sought reconsideration with respect to the Kentucky PSC's finding that BellSouth had established the requisite level of concern (to this day, we do not know which 15 circuits and certifications are implicated and we have seen no evidence to support BellSouth's allegations of concern) and with respect to the Kentucky PSC's erroneous conclusion

that the independent auditor requirement could in effect only be enforced after an audit by a non-independent auditor had been suffered.

44. On April 26, 2005, NuVox filed a letter with the Kentucky PSC requesting that the PSC require BellSouth to identify the circuits to audited. NuVox has not received a response to its letter.

45. The Kentucky PSC allowed NuVox's petition to be denied by operation of Kentucky law. Under Kentucky law, such a petition is deemed denied if the PSC does not act within 20 days. The Kentucky PSC did not have a quorum; thus the commission could not have acted on NuVox's petition within the statutory timeframe. One Kentucky Commissioner had recused himself from the complaint case and another had resigned – leaving only one commissioner able to vote on the petition and the commission without the ability to act.

46. Mr. Hendrix's representations regarding the Kentucky audit are inaccurate. Grant Thornton initially contacted NuVox with a request for contact information on May 18, 2005. NuVox responded with that information (and more) on May 23, 2005. Grant Thornton issued an ultimatum for the same contact information on June 1, 2005. NuVox responded with indication that the information requested already had been provided (and more) on June 7, 2005. Contrary to Mr. Hendrix's affidavit, NuVox has yet to receive any request from Grant Thornton to "commence fieldwork." Indeed, Grant Thornton's communications to date indicate that it is still in the process of preparing document requests. NuVox is awaiting a response from Grant Thornton to its request for information relevant to Grant Thornton's engagement.

47. BellSouth filed another complaint against NuVox at the Kentucky PSC on June 3, 2005. BellSouth's complaint is without merit and NuVox will file an answer with the Kentucky PSC on June 20, 2005.

48. As to Mr. Hendrix's statements concerning BellSouth's "substantial and growing losses" (Hendrix Reply Declaration at 5), this is baseless speculation as no audit has been concluded in Georgia or elsewhere. Mr. Hendrix is simply substituting rhetoric for substance evidently hoping that this latest effort to manufacture concerns regarding NuVox's compliance will suffice for concerns that are legitimate and that would cause a reasonable person to conclude that certain of NuVox's certifications may not be accurate. To date, two state commissions have found that BellSouth has met the concern requirement with respect to a mere 55 circuits. Moreover, demonstration of a concern is not the same as demonstration of non-compliance. Indeed, NuVox's verification of KPMG's preliminary report for the Georgia audit indicates no material non-compliance among a high-risk set of circuits.

49. Mr. Hendrix's affidavit illustrates that BellSouth is abusing the limited right to audit special access conversions granted to it in the *Supplemental Order Clarification*. BellSouth is engaged in predatory and vexatious litigation designed to raise NuVox's costs and materially inhibit its ability to compete effectively with BellSouth. Moreover, it is designed to shield BellSouth from having to comply with the Agreement and FCC mandates incorporated therein.

This concludes my Reply Declaration.

Riley M. Murphy

Affirmed to me this 16th day of June, 2005.

Notary Public